In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-546

GEORGE V. H. KLEIFGEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was denied the effective assistance of counsel both at trial and on appeal.

Following a jury trial in the United States District Court for the District of Nevada, petitioner was convicted of nine counts of filing fraudulent claims for payment under the Medicare program, in violation of 18 U.S.C. 1001.[1] He was sentenced to three years' imprisonment on each count, the terms to run concurrently. The court of appeals affirmed without opinion. Petitioner's untimely petition for rehearing was denied (Pet. App. A).

Petitioner was a medical doctor, many of whose patients were eligible for coverage under the Medicare Act, 42 U.S.C. 1395, *et seq.* Alerted by what appeared to be

[1]Petitioner's earlier trial on the same charges had ended in a mistrial when the jury were unable to reach a verdict.

excessive billings for services rendered to Medicare patients, an insurance claims representative requested that petitioner furnish additional documentation in order to substantiate his requests for payments (Tr. 78). Comparison of petitioner's patient records with his billings for Medicare compensation and interviews with his patients disclosed that many patients had not received the treatments specified on the request for payment forms and that petitioner had not treated these patients as frequently as his billings indicated (Tr. 128-133, 149, 165-166, 175, 182-183, 185, 202-204, 212-213). Furthermore, handwriting analysis showed that petitioner had signed the requests for payment and endorsed the Medicare compensation checks (Tr. 223-226, 235-237). Petitioner's complicity was substantiated by the testimony of four former employees, each of whom testified to an established practice of overbilling at petitioner's direction. Under this scheme, a diagnosis was listed that would support repeated office visits by the patient; subsquently, dates for the fictitious "treatments" were filled in at random, and corresponding request for payment forms were submitted (Tr. 263, 266-267, 276, 335-336, 339, 402-403, 441-442, 458).

Petitioner contends (Pet. 3-10) that he was denied the effective assistance of counsel both at trial and on appeal.[2] However, the record demonstrates that petitioner was represented by a conscientious, aggressive advocate and that his claim of ineffective assistance of counsel is groundless. Although the courts of appeals differ in the manner that they formulate the standard for ineffective assistance of counsel, compare *United States* v. *Robinson*, 502 F. 2d 894 (C.A. 7); *United States ex rel. Walker* v.

---

[2]Petitioner's contention that the assistance of counsel on appeal was inadequate is based primarily on the fact that the court of appeals affirmed his conviction without opinion (Pet. 14). But his attorney developed eleven separate issues in his brief on appeal. That the court of appeals chose to affirm petitioner's conviction summarily in no way reflects upon the adequacy of his attorney's representation.

Henderson, 492 F. 2d 1311 (C.A. 2), certiorari denied, 417 U.S. 972, with *Beasley* v. *United States*, 491 F. 2d 687 (C.A. 6); *United States* v. *DeCoster*, 487 F. 2d 1197 (C.A. D.C.), under any imaginable standard, petitioner received effective assistance. The record shows that counsel's performance was well within the range of competence demanded of attorneys in criminal cases, *McMann* v. *Richardson*, 397 U.S. 759, 771, and did not impair the essential integrity of these proceedings.

Petitioner cites (Pet. 7-10) several examples of counsel's allegedly inadequate performance. In particular, he emphasizes counsel's failure to object to the allegedly prejudicial composition of the jury, his failure to move to suppress certain evidence, his failure to object to the introduction of certain documentary evidence, and his failure to subpoena a potential defense witness to testify at trial.[3] These contentions, even if supported, would not establish a denial of petitioner's Sixth Amendment right to the effective assistance of counsel, for the tactical conduct or strategic miscalculations of counsel afford no constitutional grounds for relief. *McMann* v. *Richardson, supra; United States ex rel. Walker* v. *Henderson, supra.*

1. Petitioner's contention (Pet. 7) that counsel should have moved to suppress petitioner's office files is specious. These documents were not seized by federal authorities but rather were turned over to the insurance claims representative by petitioner in his attempt to prove that his former office assistant was responsible for the fraudulent excessive billings. Petitioner's statements to

---

[3]The same attorney had previously represented petitioner in his first trial, which resulted in a deadlocked jury. With the exception of Henry Gordon, an attorney, every defense witness who testified at petitioner's first trial also testified at his second trial.

the insurance representative that the endorsements on the checks were forged (Tr. 133-134) were not subject to suppression under *Miranda* v. *Arizona*, 384 U.S. 436, since that prophylactic rule applies only to custodial interrogations. These statements were given voluntarily at a time when petitioner was not in custody and when the investigation was focused exclusively on the office assistant.

2. Petitioner further contends (Pet. 8, 9) that trial counsel was remiss in not challenging the alleged "systematic exclusion" of minority groups from the jury panel. That panel, however, was drawn from voter registration lists, and such lists are the common and appropriate source from which jury panels are drawn. 28 U.S.C. 1861, *et seq.*; see, *e.g.*, *United States* v. *Ross*, 468 F. 2d 1213, 1216 (C.A. 9), certiorari denied, 410 U.S. 989. Whether a given jury panel is fairly representative of the community is a complex legal and factual question upon which experienced attorneys may differ. While it cannot be stated with absolute assurance that a challenge to the composition of this jury panel would not have resulted in the voter registration lists being supplemented from other sources, the absence of such an attack in no way indicates that petitioner was ineffectively represented by counsel below.

Futhermore, the record does not support petitioner's claims that the jury were prejudiced towards him by exposure to reports of his previous activities unrelated to the charges for which he was convicted.[4] Upon becoming aware that certain prospective jurors had read some news stories relating to petitioner, the trial judge conducted a careful *voir dire* examination of each prospective juror

---

[4]The purported grounds of bias of various jurors (Pet. App. D) are irrelevant. As the court of appeals stated, these contentions approach the frivolous, if not the ridiculous (Pet. App. A, p. 17).

in chambers. None of the jurors ultimately selected recalled any details of the news accounts, and each assured the court that he could render a fair and impartial verdict (Tr. 1-39). Given this careful examination by the court, trial counsel's failure to submit questions to the court for *voir dire* in no way indicated his ineffectiveness. Similarly, inadequate representation cannot be inferred from counsel's failure to challenge any jurors for cause, especially since he carefully exercised his preemptory challenges (Tr. 39).

3. Contrary to petitioner's assertion (Pet. 9), counsel's failure to object to the introduction of certain documentary evidence does not demonstrate his incompetence. When questioned as to his motivation for not objecting, trial counsel informed the court that during the previous trial of the case, he had determined that there was "nothing in the documents [which was] offensive" (Tr. 101). Such tactical decisions made by an attorney during the course of a trial are not ordinarily subject to review on appeal. See, *e.g.*, *United States ex rel. Walker* v. *Henderson*, *supra*; *United States* v. *Grant*, 489 F. 2d 27 (C.A. 8). Counsel's concern with the faithful representation of the interest of his client involves highly practical considerations, as well as knowledge of substantive law. The interests of the accused are not necessarily advanced by delaying tactics that do not advance the ultimate resolution of guilt or innocence. *Tollett* v. *Henderson*, 411 U.S. 258, 268. Thus, counsel's failure to object to the introduction of these exhibits offers no ground for relief.

4. During the trial, the defense was unable to locate Jan Hamer, an allegedly favorable potential witness. Petitioner contends (Pet. 10) that his inability to subpoena Hamer was attributable to a prejudicial pre-indictment

delay, which requires dismissal of these charges, and that the present availability of the witness warrants a new trial upon the basis of newly discovered evidence. Petitioner also claims that his defense counsel's failure to prevail on either of these theories, both at trial and on appeal, demonstrates the ineffectiveness of his assistance.

Petitioner's allegation (Pet. 9-10) of an unreasonable pre-indictment delay in violation of the Due Process Clause is groundless. As petitioner's own allegations show (Pet. App. B), the delay was due to a continuing investigation of his fraudulent dealings. Since the prosecution was initiated within the period of the statute of limitations, the delay is not of constitutional proportion unless petitioner establishes that the delay resulted from intentional government misbehavior designed to obtain a tactical advantage or produce prejudice. *United States* v. *Marion*, 404 U.S. 307; *United States* v. *Jackson*, 504 F. 2d 337 (C.A. 8), certiorari denied, 420 U.S. 964. Absent such a showing, this claim does not warrant further review.

Petitioner's only claim of prejudice arises from the inability of the defense to subpoena a witness. But according to Hamer's affidavit (Pet. App. G, p. 60), she was present at her residence immediately preceding and following the trial but could not be reached there during the trial, which was when the defense attempted to subpoena her as a witness. Since the witness was available except for a relatively brief period, the pre-indictment delay was entirely irrelevant and could not have prejudiced the defense or have been a device employed by the prosecution to gain a tactical advantage. *United States* v. *Marion*, *supra*; see *United States* v. *Andros*, 484 F. 2d 531, 533 (C.A. 9).

Moreover, it is evident from the affidavit itself that the trial court properly denied petitioner's motion for a new trial. The witness's prospective testimony was aimed at

impeaching the credibility of the four former office assistants who appeared as prosecution witnesses. But Hamer's affidavit merely speculates that if petitioner had instructed them to prepare fraudulent bills, she would have heard them discuss his scheme. The proffered testimony falls far short of establishing grounds for a new trial, and counsel's failure to prevail on this motion therefore does not demonstrate ineffective assistance. See, *e.g., United States* v. *Craft*, 421 F. 2d 693, 695 (C.A. 9).

5. The record reveals that trial counsel conducted an extensive cross-examination of the government's witnesses, developed a plausible theory of defense supported by a parade of witnesses, and effectively summarized the evidence and his theory of the case during final argument. Despite petitioner's bald assertions, the petitioner does not allege, and the record fails to disclose, any potentially exonerating defenses that were not thoroughly explored or any exculpatory evidence that was not presented to the jury. Throughout the trial, defense counsel rendered the reasonably effective assistance demanded of an attorney of ordinary skill and training in criminal law. See, *McMann* v. *Richardson, supra*, 397 U.S. at 770-771; *Beasley* v. *United States, supra*, 491 F. 2d at 696.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

DOJ-1975-12